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THE JURISDICTION OF COURTS OVER FOREIGNERS.

I. EUROPEAN LAW.

THE extent of the judicial jurisdiction of a sovereign, especially where the jurisdiction depends on some power over the person of the defendant, is a puzzling question as to which the courts of civilized nations are very far from an agreement. Nor is this disagreement likely to be removed by any international movement such as the Institute of International Law. Each state is wedded to its own views as to its power over foreigners, while at the same time it is apt to deny to all other states the extreme powers over its own citizens which it exercises itself over foreigners. The fact of this extreme claim by a state of jurisdiction for itself, coupled with the denial of similar jurisdiction for other states, leads to curious questions as to the legality within a state of the exercise of such extreme jurisdiction, and as to the action of third states, when such jurisdiction is brought in question in their courts. It seems that the most satisfactory way of dealing with the subject is to examine in the case of the principal states their claim of jurisdiction for their own courts, and their attitude toward similar jurisdiction by foreign courts. As an indispensable prerequisite to a study of the present law it is first necessary to make some examination of the state of affairs in the Roman law.

Before entering upon this examination, however, it is well to remember that the question of jurisdiction may present itself in either of two aspects. The jurisdiction which the sovereign may exercise if he chooses is one of these aspects. The sovereign jurisdiction of a state is, of course, fixed by a power outside itself. That power is the rule of international law by which sovereign jurisdiction is limited; and that rule, along with other principles of international law, is accepted by the sovereign because it is only thus that he can claim membership in the family of civilized nations. By reason of his desire to be admitted into this company the sovereign of each state accepts the principles of international law as those by which he will be governed; and the limits of his jurisdiction as fixed by that law become therefore a part of the constitution of his state. He has no right to extend this jurisdiction by any legislative act. To be sure, as a portion of the municipal law the principles in accordance with which international law limits jurisdiction may come to be interpreted by the courts; and the power of two independent courts to interpret a principle of law involves a power to differ in interpretation. Thus the courts of France and those of Italy or England may differ as to the extent of jurisdiction over foreign persons or things that may be exercised by a court; and in that sense it may be said, if we choose to speak so loosely, that the principles of jurisdiction differ. The administration of justice necessarily involves the power to interpret the entire law, whatever its source. But the exercise of the legislative power does not extend so far. The sovereign can legislate (*i. e.*, alter the law) only with regard to that part which is peculiar to his own dominions. He cannot alter international law by legislation.

It follows that if a statute should attempt to extend the jurisdiction of a court beyond the bounds fixed by international law, the statute would be void, even though the court (as is the case, for instance, in England) were bound to obey. It is true that a court erroneously interpreting international law as permitting the jurisdiction would not hold the statute void; but if it recognized that the statute transcended the legal limits of jurisdiction it would regard it as in fact void, even though constrained to act under it.[1]

[1] Blackburn, J., in Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, 159 (1870).

When, however, the international limits of a sovereign's judicial jurisdiction have been settled and it becomes a question of how this jurisdiction shall be exercised, it lies naturally within his discretion whether a power shall be executed at all, or if so in which of his courts. And it remains for him, therefore, to settle the jurisdiction of each court that he creates according to his pleasure. In this internal or constitutional sense the jurisdiction of courts lies entirely within the sovereign's law, and may be fixed by legislation at his pleasure.

A. *Roman Law.*

While no international bounds were fixed to the power of the Roman state, nevertheless a rule of jurisdiction grew up in the Roman law which is the basis of international jurisdiction as understood in the modern European states. That is the principle "*Actor sequitur forum rei.*" [2] The code of Justinian added to this the principle that the *forum rei* might be departed from in real actions,[3] and also that the breach of an obligation might form the subject of an action where the unlawful act was committed or where the contract was made or to be performed.[4] A counter-action might also be introduced where the principal action had been brought.[5] These provisions passed into the common law (*droit commun, gemeine Rècht*) which was universally received throughout Europe and is therefore the basis of its present law.

B. *The Common Law of Europe.*

Derived from the principles of Roman law, the so-called Common Law of Europe prevails with regard to the jurisdictions of courts except in so far as it has been modified by the peculiar provisions

[2] See Salkowski, Institutes and History of Roman Private Law, Whitfield's translation, p. 937.

[3] See Cod. 3. 19. 3. "Actor rei forum, sive in rem sive in personam sit actio, sequitur; sed et in locis, in quibus res propter quas contenditur constitutae sunt, iubemus in rem actionem adversus possidentem moveri." (Gratian, A. D. 385.)

[4] "Unusquisque in qua provincia delinquit aut in qua pecuniarum aut criminum reus sit, sive de terra et de terminis sive de proprietate sive de possessione aut hypotheca vel de qualibit alia occasione, illic etiam iuri subiaceat, . . . ut ultra terminos litigare non quaerat." Nov. 69, c. 1.

[5] Nov. 69, c. 2. See this and other references in Mackenzie's Roman Law, 7 ed., 350–351.

of the French civil code and other codes based upon it. This modification will be later considered.

(1) *Right of a Foreigner to Sue.* According to the common law, which is followed in most of the codes of civil procedure, a foreigner has a full right to seek the courts of a country for the purpose of bringing any action which is in other respects within the competence of the court. This right is most liberally expressed in an article of the German code of civil procedure:[6] "A foreigner who cannot sue according to his own law may nevertheless sue, if he is competent by the law of the court in which he brings suit." The code also provides that "any person who may contract may sue."[7] This is also the law in Austria and Italy,[8] in Belgium since the Procedure Act of 1876,[9] in Holland,[10] Luxembourg,[11] and Monaco.[12] It is also, it seems, the law of South America; at least, this is the case in Columbia[13] and Peru.[14]

In some states foreigners are required before bringing suit to furnish a guaranty for the payment of a judgment against them for costs in case their suit fails (*cautio judicatum solvi*); and, as will be seen, this is provided in France wherever a foreigner is allowed to sue. This seems to be regarded in some of the states as in derogation of the common law, and as opposed to the principle of free access to the courts.[15] It seems, however, tolerably clear that the necessity of furnishing such security is not in derogation of the right to sue. Where a native brings suit he can always be reached and held to answer for a judgment for costs. In the case of a foreigner, however, he may leave the state before judgment, or he may in fact never have entered its borders. If he were allowed free access to the courts without security for costs, his risk in bringing suit would be less and the risk of his opponent would be

[6] See Civilprozessordnung, section 55.

[7] See *ibid.*, section 52.

[8] See Bar, International Law, Gillespie's translation, 2 ed., p. 884.

[9] See Mons, 16 Jan. 1891, Pasic. Belg. 1892, 3, 161, 20 Clunet 443; Antwerp, 27 Aug. 1910, 36 Clunet 235.

[10] Amsterdam, 28 April 1893, 21 Clunet 184.

[11] See Syndics *v.* Manes, 5 Jan. 1887, 14 Clunet 674.

[12] See Rolland in 17 Clunet 247.

[13] See E. Champeau in 21 Clunet 930, at p. 937.

[14] See P. Pradier-Fodéré in 6 Clunet 250.

[15] See what is said on this point by E. Champeau, Condition of Foreigners in Columbia, 21 Clunet 930, 937.

greater than in the case of a native plaintiff. Compelling him to furnish security therefore simply puts him on an equality with the native plaintiff. In the German code of civil procedure a foreigner is required to furnish security before he sues;[16] and in most of the states where such action is allowed this is also required. In Italy, however, the opposite view is taken and carried to an extreme. Not only does the law permit a foreigner to sue without furnishing security for costs, but a foreign plaintiff is given a right to avail himself of the law of December 6, 1865, amended July 19, 1880. By the terms of this law parties who cannot furnish the money necessary to establish their legal rights in court may obtain from the government the money necessary to pay expenses, and the gratuitous assistance of attorneys and advocates. A foreigner may therefore enjoy the privilege of having his legal expenses paid by the Italian government.[17]

The question whether a foreign corporation may sue on the same terms as a foreign individual is discussed at length by von Bar.[18] The prevailing doctrine of the Continent appears to allow foreign juridical persons to stand on the same basis as natural persons. There is, however, considerable authority the other way, on the ground that the public policy of a state is interested in determining how far artificial persons may be given standing. The German Reichsgericht has given with force the reasons for allowing suit by a foreign corporation, even though the public policy of the state may forbid it to do business in the state.[19]

(2) *Suit against a Foreigner.* As a general rule the proper court for suit is that of the defendant's domicile, and a defendant may always be sued at his domicile. Any one, therefore, whether a foreigner or a native, who is domiciled within the country may be sued there.[20] In case of one formerly domiciled in the country it has been held that he may be sued unless some other domicile is

[16] See Civilprozessordnung, section 110.

[17] See P. Fiore, Droit International Privé, tr. Antoine, vol. i, p. 325.

[18] See Bar, International Law, *supra*, § 105.

[19] Phenix Fire Insurance Co. *v.* M., 14 April 1882, Entscheidungen des R. G. Civilsachen, 6, 134, 139–142.

[20] See Bar, International Law, pp. 908, 910 n.; P. Esperson, Competency in Italian Law, 10 Clunet 263; P. Pradier-Fodéré, Legal Condition of Foreigners in Peru 6 Clunet 250.

shown elsewhere.[21] So where a Jew domiciled in Germany left that country and established himself in Russia, where a Jew cannot obtain a judicial domicile, it was held that he might be sued at his last German domicile.[22]

Whether a foreigner present or temporarily resident, but not domiciled, may be sued is not clear. In Switzerland this appears to be allowed;[23] and so where a female circus performer stayed in the place where she was performing, it was held that she had in that place a residence sufficient to permit suit against her there.[24] But the doctrine appears to have been confined to cases where there was no fixed residence or domicile elsewhere. There is a little authority for saying that where the foreigner is personally present and served with the citation he may be made subject to the jurisdiction. It has been so held in Peru,[25] and the same has been asserted to be true in Italy.[26] In this matter von Bar says:[27]

"Every one, then, so long as he is personally present in any state, is subject to the sovereignty of that state in so far as relates to his person, and so long as he possesses property or makes claim to property there, in so far as concerns that property and these claims. It is, then, not repugnant to principles of international law, that the debtor himself, if he happens to be in the country, should be seized, or his property arrested; and in consequence a judgment be pronounced without the necessity of establishing any other right of jurisdiction, giving decree, in the former case to the amount of caution required for liberation, in the latter to the amount of the value of the goods arrested. Such a jurisdiction, however, rests upon an actual exercise of power at the moment of detention, and ultimately, therefore, must be referred to a complete distrust of the judicial system of other states. . . . It seems right, therefore, to refuse international recognition to such a jurisdiction, even as regards the simple *exceptio rei judicatæ*."

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[21] See Bar, International Law, p. 910 n.; German Reichsgericht, 15 Jan. 1891, Entscheidungen des R. G., Civilsachen, 27, 400.

[22] Norddeutsche Grundkreditbank *v.* E., Entscheidungen des R. G., Civilsachen, 34, 392, 22 Clunet 850.

[23] See Trib. Fed. Switz., 26 Jan. 1899, 26 Clunet 875, Semaine Judiciaire [1899] 268.

[24] Schurmann *v.* Kasprzakow, 4 March 1899, 27 Clunet 404, Semaine Judiciaire [1899] 430.

[25] See P. Pradier-Fodéré, Legal Condition of Foreigners in Peru, 6 Clunet 250.

[26] See P. Esperson, Competency in Italian Law, 10 Clunet 263. The opinion of this author is to the contrary.

[27] See Bar, International Law, p. 912.

This passage appears to represent the view usually held by the European courts.[28] It would thus seem to be the continental doctrine that territorial power does not necessarily confer judicial jurisdiction where the defendant has an actual domicile elsewhere.

A question of some difficulty arises when parties who are incompetent to sue or be sued in a court do in fact bring suit, and submit, so far as they are concerned, to the jurisdiction; must the court declare itself incompetent "of office"? that is, must the court refuse jurisdiction in spite of the consent of the parties? It is held in most jurisdictions that the court will not of itself insist on incompetence, but if the parties agree the court will entertain the suit.[29] It has also been mooted whether or not a third state will declare the courts of one state incompetent on the ground that a second state has jurisdiction, refuse to enforce its judgment, and thus, as the argument runs, lend its assistance to the second state in vindicating its jurisdiction. But the better view doubtless is that the courts of all states will refuse to enforce the judgment of a court which had no jurisdiction in the international sense; not that the rights of the third state may be vindicated, but that justice may be done between the parties. On this point von Bar well says:[30]

"It is wrong in principle to recognize a foreign judgment or to put it into execution, if the foreign court must be regarded as incompetent, just because our courts cannot pretend to exercise jurisdiction in the case. To prevent encroachments on our own jurisdiction is not the only matter for consideration; the substantial point is that justice shall be worked out, *i. e.*, that we shall give legal assistance to the state which, in an international sense, has a right to judge."

Generally speaking, then, there is no jurisdiction over a defendant except at his domicile; but while a non-resident cannot usually be sued, there are nevertheless exceptional cases in which an action may be brought against him. The cases in which suit is commonly allowed are: (*a*) in case of a real action; (*b*) in case of contracts made or performable within the country or torts there

[28] See to this effect Rolland, Competence of the Court of Monaco, 17 Clunet 247, and a decision of the Superior Court of Monaco cited by him.

[29] Belgium: Court of Brussels, 14 Dec. 1897, 27 Clunet 1009. Denmark: Trib. Com. Copenhagen, 19 Dec. 1888, 18 Clunet 1018. Greece: Court of Appeal of Athens, 1896, 24 Clunet 618.

[30] Bar, International Law, p. 905 n.

committed; (*c*) in case of reciprocity; (*d*) in case of cross-claims; (*e*) in case of consent. In other cases the jurisdiction over a non-resident is regarded as "contrary to the law of nations." [31]

We must now consider each of these exceptions successively.

(*a*) *Real action.* It is of course a universally accepted ground of jurisdiction that a thing over which the jurisdiction is to be exercised is within the territorial power of the sovereign.[32] This is universally admitted as to actions for the actual recovery of land or for the removal of a mortgage or hypothecation on the land. Some courts go so far as to include an action upon a contract for the conveyance of land. Such was the important and interesting decision of the Supreme Court of Spain in the case of Anduce *v.* Piccioni.[33] This was an action to invalidate a contract of sale of land in a Spanish island. The contract was made at the Danish island of St. Thomas, between two persons there domiciled. Suit was brought in St. Thomas and carried by appeal to the Supreme Court at Copenhagen, where it was held that the Danish court had jurisdiction, and judgment was given for the present defendant. The plaintiff brought suit in a Spanish court, which held that the Danish court had no jurisdiction, since the object of the suit was Spanish land, and reached a decision in entire disregard of the Danish judgment. The court said:

"Questions which affect the movement and the transmission of property should be determined on the principle *lex loci rei sitæ;* because otherwise it would be easy for a nation to cause harm to other nations in a branch of right so high and sacred as that of the dominion which all nations exercise in an absolute manner over their respective territories."

On the other hand, the Civil Tribunal of Nice has decided that a suit is not confined to the *forum rei sitæ* where the dispute is only with regard to the validity of a reciprocal obligation of the parties with relation to a thing.[34] The same decision has been reached by the Swiss Federal Tribunal in the case of an action arising out of a sale of personalty.[35]

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[31] See Digesto Italiano, art. Competenza Civile, section 216; Girard *v.* Tramantano, Court of Naples, 1883, 12 Clunet 464, 1 Beale, Cases on the Conflict of Laws, 367.

[32] Bar, International Law, § 418.

[33] Revista General, Jurispr. Civil, 28, 498, 1 Clunet 253.

[34] De Boigne *v.* Gryniewitch, 4 Clunet 422.

[35] *Re* Brack, 9 March 1877, 5 Clunet 68.

Varieties of jurisdiction *in rem* are the so-called provisory seizure of property, the settlement of succession upon death, etc.[36] On this ground also must be placed actions for arrestment, or, as we should say, garnishment of property. The right to make an arrestment of property is quite clear. This right has not always been exercised where there is no other ground of jurisdiction; in other words, it has sometimes been held that arrestment alone is not sufficient to found jurisdiction.[37] Generally speaking, however, the courts take jurisdiction in such cases whether the arrestment is an *ad interim* process or final process after a judgment.[38] In a case of this sort the court's jurisdiction is limited to its determination of the arrestment, and this determination must await the action of the proper court of the principal obligation. Though the court is incompetent in such a case to determine, as between strangers, the existence of the obligation, it is on the contrary competent to pass upon the legality of an attachment or of a levy of execution resulting from a garnishment made within its jurisdiction. It ought always to grant a continuance to the attaching creditor to enable him to prove his claim before a competent court, on penalty, in case of failure to do so, of nullity of the whole process.[39]

The superiority of this procedure over our own garnishment process, where the principal defendant is absent from the jurisdiction, is at once evident. The jurisdiction is exercised over the thing garnished (whether it be a chattel or a debt) to the extent of holding it for the claimant until he can prove his claim in the ordinary way in the court of his debtor; but the existence of the claim must be proved where the defendant can meet it, and justice can be done. In such a case, under our procedure, a garnishment often results in a claimant being given payment of an alleged claim to the extent of the assets reached, although the claim is really groundless; the

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[36] See Bar, International Law, §§ 420, 420 a.

[37] Imperial Ottoman Bank *v.* Richardson, Trib. Com. Marseilles, 19 June 1893, 21 Clunet 112; Einwold *v.* German West African Co., 5 Juta 86, 1 Beale, Cases on the Conflict of Laws, 423 (1887).

[38] Caracanda *v.* Caracanda, Trib. Civ. Marseilles, 11 July 1906, 34 Clunet 362; Vorster *v.* Bonnington Chemical Co., R. O. H. G. 28 June 1872, Entscheidungen des R. O. H. G. 7, 16, 1 Clunet 33; R. G. 25 Jan. 1881, Entscheidungen des R. G. Civ., 3, 381, 9 Clunet 342.

[39] See Todesco *v.* Dumont, Civ. Trib. Seine, 8 March 1890, 18 Clunet 559, 1 Beale, Cases on the Conflict of Laws, 434.

defendant being unable, by reason of expense of taking and transmitting evidence, or at least by the innate weakness of written as against oral testimony, successfully to dispute allegations of the claimant in the distant court.

(*b*) *Cause of action arising within the country.* It is now almost universally held in Europe that a foreigner may be sued in case of all obligations, whether delictual or contractual, made or performable within the state.[40] This jurisdiction is not destroyed by a denial on the part of the defendant of the existence of the contract.[41] The Institute of International Law has urged that the suit should be brought in the court of the state whose law is applicable to the contract; but there is no such rule of law now recognized by the European states.[42] In connection with this rule it is interesting to notice the attitude taken by the European courts on the question of where the contract goes into existence. While there is some difference of opinion, the prevailing view appears to support the opinion of Merlin,[43] that the contract is complete in the place where the notification of assent is received,[44] though there is good authority for the opposite view.[45]

In a few states a distinction is made between contracts and torts, and it is held that suit cannot be brought at the *forum delicti*.[46]

An interesting question remains to be considered: whether suit may be brought on this ground in cases where the defendant was not present to be served with process, or where at least no property of his was present which could be seized. Von Bar says:[47]

"Older common-law practice, in conformity with the law of Rome and with the canon law, required, as a condition of giving jurisdiction to the *forum contractus*, that the action should be served upon the defender within the territory of the *forum contractus*, or that the defender should

[40] See Bar, International Law, § 423. Belgium: Trib. Com. Bruges, 16 May 1890, 18 Clunet 272. France: Trib. Com. Nantes, 20 July 1910, 38 Clunet 887. Italy: Geneva, 15 Dec. 1893, 24 Clunet 412 (tort); Bologna, 10 Nov. 1905, 34 Clunet 846. Roumania: Court of Bucharest, 27 Clunet 1036.

[41] Trib. Com. Nantes, 20 July 1910, 38 Clunet 887.

[42] See Amsterdam, 31 Dec. 1908, 38 Clunet 1332.

[43] See Langdell, Cases on Contracts, 156.

[44] See Trib. Com. Bruges, 16 May 1890, 18 Clunet 272; Cassation, Florence, 2 Feb. 1883, 12 Clunet 456.

[45] Gautier *v.* Gughelminetti, Semaine Judiciaire (Geneva), [1894] 165.

[46] See a decision of the Tribunal of Commerce of Antwerp, 4 Sept. 1893, as to the Dutch law, 22 Clunet 429.

[47] Bar, International Law, § 424.

possess property within that jurisdiction. Thus, in most cases, it was impossible to appeal to the *forum contractus* in cases in which the defender was not there. The modern German theory takes the view that this condition is due to the circumstance that the Roman civil process knew nothing of citation by writing. Accordingly, the defender must necessarily be cited within the jurisdiction of the court, or else the only remedy available was that the pursuer should be entitled to a *missio in possessionem* of the property of the defender which happened to be within the jurisdiction. But now that citations may be given without any limit *per requisitionem*, that condition of jurisdiction is out of place. This modern theory is recognized in § 29 of the German Civilprocessordnung.

"I believe, however, that it would be right, in the interests of international jurisdiction, to adhere to that special condition as essential to the *forum contractus*. Would it accord with the principles of *bona fides* if the creditor should allow the debtor with his whole estate to leave the jurisdiction of the court in order to raise his action subsequently before a court where the defender would find it much more difficult to maintain his case? I believe not, and am all the more persuaded that it is not so, since a widely spread usage has retained that essential condition of jurisdiction in spite of the practice of written citation."

It is clear that this was the doctrine of the Roman law and of the canon law, and it seems to have been the practice of the Roman-Dutch law in Holland and its colonies.[48] Groenewegen [49] says:

"It also seemed to our ancestors unjust and contrary to all reason to put their sickle into the harvest of another jurisdiction on the ground of their country being the place of the wrong, the contracting, or the performance. Therefore to-day [about 1648] neither in Belgium nor in France may any one be sued in the place of his wrong, contracting, or performance unless he is found there. No doubt this is the cause of the arrest of debtors, than which nothing is commoner now."

But in spite of an occasional objection it is clear that to-day, not only in Belgium and France, but in Germany as well, as von Bar has shown, action may be brought without regard to the presence of the defendant.

(*c*) *Reciprocity*. This principle of jurisdiction was probably first invented by the compilers of the French civil code. According to its doctrine a court may exercise jurisdiction over a foreigner

[48] See Einwold *v.* German West African Co., 5 Juta 86, 1 Beale, Cases on the Conflict of Laws, 423, 426 (1887).

[49] See Ad Cod. 3, 18.

wherever the courts of the foreigner would, under the same circumstances, have exercised jurisdiction over its citizens. On this principle jurisdiction is now exercised in probably all of the European countries.[50] The principle may result in the court declining a jurisdiction that it would otherwise exercise. So where it appeared that the Dutch courts exercised no jurisdiction over a foreigner in case of a tort committed in the country, a Belgian court declined to exercise jurisdiction over a Dutchman for a tort committed in Belgium.[51] This was the ground of decision in an interesting case in Genoa.[52] The obligations of an Italian company were issued by a Belgian bank. A holder of one of these obligations brought suit in Genoa against the Belgian bank and the Italian company jointly. The Italian court found that the Belgian law allowed a foreigner to be sued on an obligation when there were several defendants, one of whom was domiciled or resident in Belgium. The Italian court therefore held that suit could be brought by reciprocity in this case, but only if the Italian company was properly and not merely colorably joined as defendant.

Italian lawyers have accepted this doctrine of reciprocity with marked reluctance. In the Digesto Italiano the learned author of the article Competenza Civile discusses at length the true meaning of reciprocity. Prevailing jurisprudence interprets it according to the meaning generally accepted; that is, that suit may be brought wherever on similar facts suit might be brought in the other country. The author's own view, however, with that of a number of jurists, is that this right can be exercised only in case of treaty; otherwise, as they say, reciprocity means nothing better than retorsion. And in a case in the Court of Cassation of Turin [53] the court expressed at length its objection to the doctrine:

"The right of retorsion or of reprisal is not and cannot be a rational title or principle of law or of competence. It is allowed only to protect the citizen of one state against unjust treatment to which he may be subjected in another state. But it is now recognized that it is not fitted

[50] Austria: Supreme Court, 18 Sept. 1883, 15 Clunet 281. Belgium: 14 Clunet 359. Italy: P. Esperson in 10 Clunet 263. Switzerland: Geneva, 10 March 1894, Semaine Judiciaire [1894], 21 Clunet 1092; Geneva, 11 Jan. 1895, 22 Clunet 895.

[51] Trib. Com. Antwerp, 4 Sept. 1893, 22 Clunet 429.

[52] Court of Genoa, 16 Feb. 1885, 14 Clunet 669.

[53] 9 Dec. 1879, 8 Clunet 438.

to attain this object of protection. In fact it renders more bitter instead of soothing the sentiments of defiance, jealousy, or hostility in which nations have unhappily been brought up. This is why doctrine and jurisprudence to-day concur in restraining it within the most rigorous limits of necessity."

(*d*) *Counterclaim.* Wherever a foreign plaintiff is allowed to bring action in a country, it is obvious that he must also submit to any counterclaim made by the defendant, whether or not the defendant could originally have brought action there upon the demand which is the subject of the counterclaim.[54]

(*e*) *Consent.* Jurisdiction by consent of the defendant is universally admitted. This consent may be manifested in either of three ways: by appearance in the suit, by agreement beforehand upon a court in which the suit is to be tried, or by election of domicile.

Where a defendant voluntarily appears in a suit he cannot afterwards object to the jurisdiction of the court, since by entering upon a defense on the merits he has accepted the jurisdiction of the court.[55]

A special agreement that disputes arising upon a contract shall be settled within a certain court, it has been generally agreed, gives jurisdiction to that court.[56] The courts of Monaco alone have declared that it is contrary to public policy that they should be ousted of jurisdiction on such an agreement.[57] An express agreement upon a place of performance does not constitute such an agreement.[58]

A special method of agreeing upon the competence of a foreign court is the election by the foreigner of a domicile within the foreign state for the purpose of suit. The election of such a domicile applies, it would seem, only in the matter in connection with which the election of domicile is made.[59] It has been held in Austria that

[54] See Laurent in 4 Clunet 505; Ghent, 22 May 1912, 39 Clunet 1236. See, however, Bar, International Law, p. 926.

[55] Trib. Klagenfurt (Austria), 17 Sept. 1899, 27 Clunet 174, Juristische Blaetter, 1899, 455, No. 33; Court of Algiers, 23 May 1882, 10 Clunet 158.

[56] Trib. Civ. Seine, 10 Feb. 1886, 13 Clunet 324; Trib. Com. Marseilles, 17 Dec. 1894, 22 Clunet 591; R. G., 22 Feb. 1894, 26 Clunet 397.

[57] 26 Clunet 418, 31 Clunet 453.

[58] Court of Douai, 2 Dec. 1905, 34 Clunet 355.

[59] Trib. Com. Marseilles, 25 Feb. 1878, Jurisp. Com. et Marit. de Marseille, [1878] 49, 5 Clunet 372; Swiss Fed. Trib., 4 May 1888, 17 Clunet 511. See, however, Trib. Civ. Seine, 26 July 1879, 7 Clunet 100; French Cassation, 4 March 1885, 12 Clunet 445.

such election of domicile simply authorizes suit in the foreign country, and does not bar suit against the defendant at his own domicile.[60]

(3) *Foreign Corporations.* It is generally held that a foreign corporation may be sued on the same principle as a foreign individual; but in the nature of the case greater difficulties must be experienced in working out the result.[61] Where, however, the corporation has a place of business and an agent within the state, jurisdiction over it is probably universally exercised.[62] A special difficulty arises with regard to the so-called *moral persons* which are in fact universal societies, as for instance the Church. This difficulty was felt in a case where the Superior General of the Congregation of the Ladies of the Sacred Heart brought a suit in Rome. The Court of Cassation of Rome finally held that the action would not lie. In the course of its opinion the court said:

"Moral persons created in one state have no existence beyond the frontiers of the state which has recognized and created them, and this for two reasons: first, because the sovereign power which is at once confined within the limits of its own territory cannot give to an artificial person a universal existence which it does not possess itself; second, because a moral person represents an idea which has its reason for existence and ought to serve a political, economic, and religious purpose which is necessarily national. Beyond the frontiers of the state where it has been created, this reason for existence and this object not only cease to exist, but may even be found in opposition to the established conditions of the local public law. The present court has already decided that a religious order, even if it presented such a character of universality as that of the Jesuits, could not be considered and treated from the point of view of the civil law as constituting a moral person. It could not be so regarded because there is neither a universal state nor a universal legislator which is capable of conferring this character of universality. As a result in everything which concerns the acquisition and possession of property the order of Jesuits is resolved into as many distinct legal personalities as there are states in which it is recognized."

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[60] Supreme Court of Austria, 12 March 1890, 20 Clunet 214; and see Trib. Civ. Marseilles, 11 July 1906, 34 Clunet 362.

[61] See Bar, International Law, p. 229.

[62] See Cas. Turin, 29 Aug. 1911, 39 Clunet 591.

C. *The Law of France.*

The French law has had an independent development so far as it was affected by the provisions of the French civil code and by jurisprudence since its adoption. This code applied also to Belgium, and its provisions have been precisely adopted in Roumania; the law of those two countries therefore is the same as that of France, except so far as it has been modified by later legislation.

(1) *Right of a Foreigner to Sue.* Whether a foreigner may sue another foreigner in the French court has been much debated.[63] There is no express provision of the civil code limiting the right of a foreigner to stand in justice. Laurent says on this point:[64]

"The civil code says nothing of litigation between foreigners. Should this silence be interpreted as meaning that the French courts are incompetent to decide disputes between foreigners? That is the doctrine adopted by French jurisprudence. It has been admitted that this only amounts to a denial of all justice. If such were the positive will of the legislator, it would be necessary to accept it; protesting, however, in the name of the public conscience, against a law which would permit a debtor to mock at his creditor. But we shall search vainly in our law for any provision which forbids a judge to entertain a suit between foreigners. The court of Brussels says that there is no text which forbids it. If no law forbids the French courts from deciding disputes between strangers, why, then, should they declare themselves incompetent?"

He then proceeds to consider reasons which have been given for denying jurisdiction, and concludes that they are "excessively weak." The decision of the court of Brussels referred to by Laurent is the case of Lhullier *v.* Naintre.[65] This was an action between two Frenchmen, growing out of a business done in Brussels. The court took jurisdiction on the ground that there was no provision of law to forbid it. Von Bar also[66] appears to find the rule denying access to the courts indefensible. The French law before the code had no

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[63] For a thorough study of this particular question see "Jurisdiction in Actions between Foreigners" by Professor A. Pillet in 18 HARV. LAW REV. 325. In this article the history and philosophy of the doctrine is discussed. No attempt is here made to reëxamine the subjects there discussed.

[64] See Droit Civil, Vol. i, § 440.

[65] See Pasicrisie Belge, 1863, 2, 351.

[66] Bar, International Law, p. 883.

such interpretation. As then settled, a foreigner, to be sure, could not sue a native without giving surety for payment of judgment (*cautio judicatum solvi*). When, however, two foreigners sued each other the plaintiff need not give security unless the defendant, first offering security himself, demanded it.[67] So far as can be seen foreigners were entirely free to sue one another.

The French law was settled by the decision in the case of Mount-Florence *v.* Skilpwith in the Court of Cassation on the twenty-second day of January, 1806.[68] The defendant was the American consul at Paris, and the plaintiff was the chancellor of the consulate. They had made an agreement to share the emoluments of the consulate for a year. The plaintiff sued for his share of the emoluments in the Tribunal of First Instance, and recovered. The Court of Appeal of Paris, however, held the French courts incompetent, saying:

"According to the common law, and the very intention of the parties, such a suit can have no other judges than the representatives of the United States in France, and the courts of their nation."

The Court of Cassation upheld this decision, after a skilful argument in its favor by the great advocate Merlin; saying, that since the parties were foreigners, not domiciled in France, and the action was merely personal, and not growing out of an act of commerce, the maxim *actor sequitur forum rei* applied. Two earlier decisions were distinguished, on the ground that in them the parties had consented to the jurisdiction.

This doctrine has remained that of the French courts until the present day, although it has been severely attacked from time to time by writers within France as well as outside.

In certain cases it is agreed that a foreigner may sue another foreigner in France. From the first this has been allowed in case of consent of the parties.[69] Suit will also lie between foreigners in the Tribunal of Commerce, where the business done was in France.[70] In the Civil Tribunal suit may be brought, though the plaintiff has no authorized domicile, provided the parties have actually lived

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[67] See Guyot, Repertoire, Art. Étranger.

[68] See Sirey 2, 1, 206.

[69] Algiers, 24 Dec. 1889, 18 Clunet 1171.

[70] Trib. Com. Seine, Oct. 18, 1890, 7 Clunet 587; Tunis, 2 March 1905, 33 Clunet 1116, Jour. Trib. Tunisie, 1906, 220.

and done business in France. In any suit growing out of such business the foreign residents may sue one another. In the case of Vanguilbert *v.* Vandevière in the Civil Tribunal of Lille[71] suit was brought by one foreigner against another for goods sold. Both parties had been living in France for several years and, as the court said, might be considered "as having their domicile there, and as having reciprocally submitted themselves as to the execution of their obligation to the jurisdiction of the French courts." In the case of Kowalski *v.* Mocaluvo,[72] an action for the rent of a piano, both parties were residents of France but not domiciled there. The tribunal gave the following opinion:

"In hiring a piano at the Hertz establishment, Mocaluvo has obviously elected at Paris a domicile for the execution of his contract, and has submitted to the jurisdiction of the French courts; especially since he cannot indicate a foreign domicile where he may be sued, alleging only that he was born in Sicily. . . .

"This firm [Hertz], and its successor Kowalski, did an act of commerce in letting and eventually selling a piano to Mocaluvo. France, in permitting foreigners to establish themselves within her territory and there to engage in commerce, assures them by implication her protection for the enforcement of contracts good by the law of nature made between them within her territory, while engaged in commerce. It would be otherwise if the suit concerned the personal status of foreigners and the application of the laws of their own countries."

Belgium has by legislation [73] brought her law on this point into accordance with the general common law of Europe, so that now a foreigner may sue on the same footing as a native.

(2) *Suit against a Foreigner.* The peculiar provisions of the French code for suing a foreigner are contained in section 14 of the civil code:

"The foreigner, even though not a resident of France, may be cited before the French tribunals, for the execution of obligations contracted in France, with a Frenchman; and may also be sued in the French tribunals upon obligations contracted by him abroad, with a Frenchman."

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[71] 12 Clunet 291 (1855), 1 Beale, Cases on the Conflict of Laws, 525.

[72] Civ. Trib. Seine, 21 Jan. 1885, 12 Clunet 176, 1 Beale, Cases on the Conflict of Laws, 526.

[73] Law of March 25, 1876, Arts. 52–54; Pasinomie, 1876, 157.

This has been held to apply as well to quasi-contracts and delicts as to contracts.[74] From the last part of this section, in derogation as it was from the common law,[75] has resulted the doctrine peculiar to the French and Belgian courts that a citizen has a claim on his own court, so that he may resort to that for the decision of all his disputes no matter who the other party may be.

"The object of this provision, containing as it does an exception to the rule *actor sequitur forum rei*, is to assure to a Frenchman the benefit of the national courts. It follows *a fortiori* that a defendant cannot, contrary to the rules of the common law, be withdrawn from his natural judges. Foreign courts are therefore on principle incompetent as concerning him." [76]

Such being the view of the French law, it must be obvious that if the same view is taken by the court of another state, and its jurisdiction is extended over all of its citizens, there is an insoluble conflict of jurisdiction, and neither court will recognize the acts of the other. And such is the case. In imitation of the French provisions, similar provisions have been inserted in the codes of procedure of a number of European states, and they have given judgment in their courts against Frenchmen. Such judgment the French courts will not recognize.[77] The phrase of the Court of Paris already quoted is conclusive on this matter; the Frenchman still retains his right to be sued in his own court. But if the French court will not recognize the foreign judgment, neither will the foreign court recognize the French judgment in such cases. So the Italian court has said [78] that Article 14 of the French civil code is

"contrary to the provisions of Art. 105, number 2, of the [Italian] code of civil procedure, submitting to Italian jurisdiction suits relative to obligations performable in Italy, or resulting from contracts made or acts done in the kingdom. It thus contains a usurpation of jurisdiction that belongs to the Italian courts. It sets up an extravagant claim of jurisdiction, contrary to the law of nations, and therefore not to be recognized in any state whose municipal public law it violates.

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[74] See Poitiers, 8 Prairial an 13, Sirey 6, 2, 40.

[75] See F. Laurent in 4 Clunet 505.

[76] Court of Paris, Young *v.* Dreyfus, 12 Clunet 539, 1 Beale, Cases on the Conflict of Laws, 379 (1885).

[77] See Howe *v.* Bernheim, Trib. Com. Seine, 4 Feb. 1880, 7 Clunet 104.

[78] Girard *v.* Tramontano, Court of Naples, 1883, 12 Clunet 464, 1 Beale, Cases on the Conflict of Laws, 367.

"It is in vain to urge that a foreigner in contracting with a Frenchman, whenever he knows the provisions of Art. 14 of the Code Napoleon, is regarded as having waived the right of being judged by his natural judges. For the individual who cannot by his own will obtain within his own country other judges than those provided by the laws of the state cannot, *a fortiori*, escape the rules of competence established by public international law."

So in the English case of Schibsby *v.* Westenholz [79] Blackburn, J., refused to recognize the French judgment under similar circumstances.

But the difficulty with this provision is not limited to the fact that the judgment of one country based upon it will be disallowed in another. The foreign judgment will not be recognized as sound, and a Frenchman will not be barred by the foreign judgment even though he appears and litigates the matter in the foreign suit; [80] but, on the other hand, the foreigner, while he cannot rely upon his foreign judgment in the French court, is nevertheless held to be barred from proceeding on the original cause of action, because of his election to the foreign domicile, and he is thus left absolutely without remedy in France.[81] The statesmen of the French Revolution professed to be governed by consideration for the rights of all mankind, and boasted that they were sweeping away the disabilities which, to the shame of the mediæval sovereigns, had been imposed upon foreigners; but they were in fact establishing disabilities and discriminations which other nations abhor.

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[*To be continued.*]

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[79] L. R. 6 Q. B. 155, 1 Beale, Cases on the Conflict of Laws, 328 (1870).

[80] See Kharkofl Tramways *v.* Bonnet, Pand. Belg. 1891, 116, 18 Clunet 591; Lemaire *v.* Charrier, Trib. Civ. Seine, 27 Fed. 1884, 11 Clunet 390.

[81] See Trib. Com. Seine, 24 June 1893, 20 Clunet 1149.